

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 12, 2009

IN RE B.R.M.

**Appeal from the Juvenile Court for Montgomery County
No. 143-10 Ross H. Hicks, Judge**

No. M2008-00854-COA-R3-JV - Filed July 28, 2009

Mother challenges the juvenile court's decision to adopt a parenting plan making father the primary residential parent and giving him more residential parenting time once the child starts school. We affirm the decision of the juvenile court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, C.M.

Deborah S. Evans, Clarksville, Tennessee, for the appellee, W.D.

OPINION

B.R.M., a boy, was born in October 2006 to C.M. ("Mother") and W.D. ("Father"). At the time of B.R.M.'s birth, Mother was not married; Father was married to M.D., and he remained married to M.D. at the time of the hearing in this case.¹

In January 2007, Father filed a petition to establish parentage and to obtain a parenting plan. According to the petition, Mother had moved to Texas in December 2006, and "since the birth of the minor child, [Mother] has denied [Father] from having visitation with the minor child, unless the visitation occurs under her direct supervision." Father submitted a proposed parenting plan providing for equal residential parenting time on a schedule of alternating months with Mother being the primary residential parent. Mother later submitted a proposed parenting plan under which she would be the primary residential parent and have the majority of the residential parenting time with the child. In May 2007, the juvenile court entered an order giving Father visitation one weekend per month pending the final hearing. The parties engaged in discovery.

¹Father and M.D. have two children from their marriage.

The case was heard by a juvenile court referee in September 2007. The referee found that Mother had failed to comply with the court's previous orders² and had moved without notifying Father. The referee ordered Mother to surrender the child to Father immediately and approved Father's proposed parenting plan. Mother moved for a de novo hearing. In November 2007, Father filed a motion for sanctions based upon Mother's alleged failure to comply with discovery.

The case was heard by the juvenile court judge on November 29, 2007. Father testified that Mother had once told him about an incident when Mother's father had whipped Mother's daughter³ and thrown her on the couch. Father also testified that when he went to visit with B.R.M. in Texas, Mother would not allow him to see where they were living. On cross-examination Mother introduced into evidence Father's tax returns for 2004, 2005, and 2006 as well as bank statements from his trucking company. She asserted that the earnings reported by Father were too low. Father admitted that, due to his work, B.R.M. attended day care when in Father's custody.

Mother testified that she was living in Aubrey, Texas, with her father. She was working on her father's ranch in order to be able to spend more time with B.R.M. On cross-examination, Mother denied saying that her father had thrown her daughter across the room. Counsel for Father produced an audio tape recording of a conversation between Mother and her father.⁴ The juvenile court took the matter under advisement.

On December 13, 2007, the court entered an order legitimating B.R.M. and changing his last name to that of Father. The court also modified and signed a proposed parenting plan submitted by Father, thereby making Father the primary residential parent with each parent exercising equal parenting time until B.R.M. reaches school age, at which time Father would have the child for 247 days and Mother for 118 days per year. When the parties appeared before the juvenile judge, Mother objected to the lack of findings to support the approved parenting plan, especially the determination that Father would have primary physical custody of the child once he reaches school age. The court then asked each party to submit proposed findings of fact. On December 21, 2007, Mother filed a motion to alter or amend the parenting plan signed on December 13, 2007. She requested that the court "make findings with regard to each factor under T.C.A. § 36-6-404 and adopt the Mother's parenting plan."

Each side submitted proposed findings of fact. The court accepted Father's proposed findings, as amended, on January 8, 2008. The court added the following statement to the proposed findings: "The Court finds that the mother presented false proof on a material fact. She testified that she did not tell the father something. A tape recording was presented that showed she lied."

²Previous orders addressed visitation and discovery.

³Mother has a daughter from another relationship.

⁴The audio tape is not part of the record on appeal.

Mother's motion to alter or amend was heard on March 2, 2008. After hearing the arguments of both parties, the court decided to review the proposed findings of fact and to listen to the recording of the November 2007 hearing. The court made the following statements:

And I'm probably going to go sit down and check off what I find to be the facts and then I will probably sit down and make a list of what I find the fact to be . . . [Counsel for Mother] is exactly right. Perhaps I didn't go about it exactly the way it should have been done, but that's what I'm going to do this time.

The court also addressed Mother's argument that the court should not make a determination as to B.P.M.'s primary residential parent at the time he reached school age. The court expressed its intention to revisit that issue but noted that there were pros and cons to making a determination now as opposed to waiting until the child actually reaches school age.

On April 2, 2008, the court entered an order again adopting the amended findings of fact submitted by Father and the parenting plan under which Father would be the primary residential parent and exercise a greater amount of parenting time than Mother when the child reaches school age. In an order signed on April 3, 2008, the court stated that after reviewing all of the cases and "in the interest of judicial economy," it had elected "not to change the order concerning when the child becomes of school age."

On appeal, Mother argues that the court erred (1) in adopting a parenting plan without first considering the statutory factors and (2) in designating Father the primary residential parent when the child reaches school age because at the time of the determination, the child was only a year old and the parties shared equal parenting time.

STANDARD OF REVIEW

In cases involving custody and visitation, our review of the trial court's findings of fact is de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 570.

Determinations regarding custody and visitation "often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves." *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). Thus, the courts will not disturb a trial court's parenting plan unless its decision is based on a material error of law or is contrary to the preponderance of the evidence. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

ANALYSIS

1.

Mother argues that the trial court erred in adopting a parenting plan without first considering the factors set out in Tenn. Code Ann. § 36-6-404.

We first note that because the present case involves parties who were never married, the appropriate statutory factors are found at Tenn. Code Ann. § 36-6-106(a). *Stacey v. Archer*, No. M2007-02829-COA-R3-CV, 2008 WL 3895970, *4 n.3 (Tenn. Ct. App. Aug. 22, 2008) (no Tenn. R. App. P. 11 application filed); *Dillard v. Dillard*, No. M2007-00215-COA-R3-CV, 2008 WL 2229523, *4 n.4 (Tenn. Ct. App. May 29, 2008). This distinction does not change our analysis, however, since these provisions, Tenn. Code Ann. §§ 36-6-106(a) and 36-6-404(a), contain essentially the same factors for determining comparative fitness and the best interest of the child. *Dillard*, 2008 WL 2229523, at *6 n.5.

Tenn. Code Ann. § 36-1-106(a) requires a trial court to consider all of the applicable statutory factors in making a custody determination. A trial court is not, however, required to list each factor and specify its effect on the overall determination. *Dillard*, 2008 WL 2229523, at *5. Mother argues that the trial court erred in failing to even consider the statutory factors as evidenced by its initial approval of Father's proposed plan without any supporting findings of fact. Even if we accept Mother's assertion that the trial court's initial parenting plan decision failed to take into account the statutory factors, Mother's argument must fail, however, because the trial court expressly reconsidered its initial decision and made specific written findings of fact in support of its final determination.

Moreover, we find no error in the trial court's acceptance of proposed findings of fact from the parties. *See Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51, 53 (Tenn. 1981). The court modified Father's proposed findings and adopted them as the findings of the court. These findings support the parenting arrangement adopted by the court.

2.

Mother further argues that the trial court erred in deciding that Father would have more parenting time with the minor child and be the primary residential parent once the child reaches school age.

As a practical matter, in light of the fact that Mother currently lives in Texas and Father currently lives in Tennessee, one parent will need to have the child for the majority of the time once B.R.M. is old enough to start school. The trial court acknowledged that there are pros and cons with respect to the court resolving that issue now or waiting until the child reaches school age. The court specifically found that Mother was not a credible witness and that she "has not exhibited a willingness or ability to facilitate and encourage a close and continuing parent-child relationship

between the minor child and the Father.” The evidence does not preponderate against the court’s factual findings, which support its decision to make Father the primary residential parent and to give him greater parenting time once the child is ready to start school.

Of course, Mother may in the future file a petition to modify the parenting plan and make her the primary residential parent if there is a material change of circumstances affecting the child. *See* Tenn. Code Ann. § 36-6-101.

We find no merit in the Mother’s challenges to the trial court’s parenting plan and affirm the decision of the trial court. Costs of appeal are assessed against Mother.

ANDY D. BENNETT, JUDGE